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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

HENRY C. CLANCY, Petitioner

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Filing Date: October 22 , 1986.

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QUESTIONS PRESENTED

1. Whether the Court of Appeals abused its discretion by limiting its award of attorneys' fees under the Back Pay Act and the Equal Access to Justice Act to the amount of attorneys' fees actually incurred by the Petitioner pursuant to the terms and provisions of a fee agreement entered into between the Petitioner and his attorney.

2. Whether, under the Equal Access to Justice Act, the Court of Appeals abused its discretion by refusing to award to Petitioner attorneys' fees incurred in the course of post-decision activity in implementing a final Court decision.

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The Petitioner, Henry C. Clancy, respectfully prays that a Writ of Certiorari issue to review the opinion, decisions and orders of the United States Court of Appeals for the Federal Circuit entered in the above-entitled proceeding on July 25, 1986, August 13, 1986 and October 1, 1986.

OPINIONS BELOW

The relevant opinions, decisions and orders of the Court of Appeals for the

Federal Circuit have not been reprinted. They are supplied in the appendix hereto, page 1a, infra.

JURISDICTION

Invoking federal jurisdiction under 5 U.S.C. Section 7703, Petitioner sought review in the United States Court of Appeals for the Federal Circuit (the "Court of Appeals") of the decision and order of the Merit Systems Protection Board (the ("M.S.P.B.") decided September 7, 1983, Case Number SF 075281F2098, which decision sustained the removal of Petitioner by Respondent from his position of Air Traffic Controller Specialist as a result of Petitioner's participation in the Air Traffic Controller's strike of 1981.

The Court of Appeals, in an unpublished opinion dated and entered on August 30, 1985, reversed the decision of the M.S.P.B.

without remand to the M.S.P.B. and without further instructions. See appendix hereto, page 1a , infra.

On July 25, 1986 and again on August 13, 1986, the Court of Appeals denied Petitioner's request under the Equal Access to Justice Act (the "E.A.J.A.), 28 U.S.C. Section 2412 (1982), for attorneys' fees and expenses incurred by Petitioner subsequent to the Court of Appeals' August 30, 1985 decision and as a result of Petitioner's attorneys' efforts to implement the August 30, 1985 decision of the Court of Appeals. See appendix hereto, pages 1b and 1c, infra.

On October 1, 1986, the Court of Appeals limited the award of attorneys' fees to Petitioner to an amount equal to Four Thousand Dollars ($4,000.00) under the Back Pay Act, 5 U.S.C. Section

5596(b)(1), for attorneys' fees incurred by Petitioner in his appeal to the M.S.P.B. and to One Thousand Five Hundred Dollars ($1,500.00) under the E.A.J.A. for attorneys' fees resulting from Petitioner's appeal to the Court of Appeals.

The jurisdiction of this Court to review the decisions and orders of the Court of Appeals dated and entered on July 25, 1986, August 13, 1986 and October 1, 1986 is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

1. 5 U.S.C. Section 5596(b)(1). Award of reasonable attorneys' fees in a personnel action.

An employee of a federal executive agency who, as a result of an unjustified or unwarranted personnel action, has had his pay withdrawn, is entitled to receive

reasonable attorneys' fees related to the personnel action.

2. 28 U.S.C. Section 2412(b). Discretionary award of attorneys' fees to prevailing party.

Absent an expressed statutory prohibition, a Court may award reasonable attorneys' fees to the prevailing party in any civil action brought by or against the United States.

3. 28 U.S.C. Section 2412(d). Mandated award of attorneys' fees to prevailing party.

In any civil action (other than a tort action) brought by or against the United States, and absent special circumstances or a finding by the Court that the position of the United States was substantially justified, a court shall award to the prevailing

party (other than to the United States) attorneys' fees and other expenses incurred by that party.

STATEMENT OF THE CASE

Petitioner, an Air Traffic Controller Specialist, was a member of the PATCO union and in 1981 joined the union in its strike against the Respondent. Petitioner was subsequently discharged by Respondent as a result of his participation in the strike, and on December 17, 1982, Officer Phillip Arnaudo of the Merit Systems Protection Board (the "M.S.P.B."), sustained Petitioner's removal following an evidentiary hearing in which Petitioner represented himself "in pro per".

Desiring the M.S.P.B. to review the decision of the M.S.P.B. hearing officer, Petitioner retained the Law Offices of Max C. Richards, P.C., now Richards and

Eisenstein ("Richards"), to represent him in such appeal before the M.S.P.B. Aware that Petitioner was currently unemployed and had been unemployed for more than a year and that Petitioner had very little money to pay Richards its attorneys' fees, Petitioner and Richards entered into a fee agreement wherein Petitioner was to pay Richards an amount equal to Four Thousand Dollars ($4,000.00) pursuant to the terms and provisions of two (2) attorney fee letter agreements dated December 31, 1982 and January 12, 1983 (to be provided with the appeal brief). In addition, it was understood by the Petitioner that, in the event Petitioner's appeal was successful, Richards would petition for an award of attorneys' fees in an amount equal to the product of Richards' hourly rate for legal services ($90.00) times the number of hours worked

by Richards.[1]

Petitioner's petition for review to the M.S.P.B.[2] was denied on September 7, 1983 and Petitioner then appealed the decision of the M.S.P.B. to the United States Court of Appeals for the Federal Circuit (the "Court of Appeals").[3]

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[1] The fourth paragraph of the attorney fee letter agreement dated January 12, 1983 specifically states that in the event Petitioner is awarded attorneys' fees, the reasonable value of Richards' services would be calculated at a rate equal to $90.00 per hour, times the amount of hours worked by Richards and that Richards would be entitled to the entire amount of attorneys' fees awarded to Petitioner even if the award exceeded the amount Petitioner had or was contractually required to pay Richards.

[2] M.S.P.B. Case No. SF 075281F2098.

[3] U.S. Court of Appeals for the Federal Circuit, Appeal No. 85-1077.

Petitioner and Richards entered into a new fee arrangement for the appeal to the Court of Appeals, as evidenced by the September 27, 1983 and December 31, 1984 attorney fee letter agreements (to be provided with the appeal brief). Under the terms of these two agreements, Petitioner agreed to pay Richards an additional sum of One Thousand Five Hundred Dollars ($1,500.00) with the understanding that in the event the appeal was successful and Petitioner was awarded attorneys' fees, the amount due and owing to Richards would be calculated at an hourly rate of $90.00 times the number of hours worked by Richards, and the entire award of attorneys' fees would be paid to Richards.

On August 30, 1985, the decision of the Court of Appeals reversing the decision of the M.S.P.B. was entered, but the Court's unpublished decision did not order Petitioner reinstated to his former

position as an Air Traffic Controller Specialist with the Federal Civil Service, nor did it order Respondent to pay the Petitioner the amount of pay as well as other benefits[4] which Petitioner was denied for the time period in which Petitioner had been wrongfully discharged, nor was the matter remanded to the M.S.P.B. for a hearing on the amount Respondent was liable to Petitioner for back pay and other benefits.

Petitioner's attorneys were therefore strategically in limbo, not sure procedurally how to enforce and implement the decision of the Court of Appeals reversing the decision of the M.S.P.B.

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[4] The other benefits include, but are not limited to, the amount Respondent owed to Petitioner for overtime, pay raises, retirement benefits, pension benefits, medical insurance benefits and vacation pay which Petitioner would have received but for Petitioner's wrongful discharge.

which had sustained Petitioner's discharge, and therefore were forced to spend a large amount of time (i) researching the procedural steps which should be taken next in order to remedy the wrong done to Petitioner by Respondent, (ii) petitioning the Court of Appeals for a clarification of its decision and for a remand to the M.S.P.B., and (iii) negotiating with Respondent for Petitioner's reinstatement, back pay and other benefits due and owing to Petitioner by Respondent.

The attorney fee arrangement negotiated between Petitioner and Richards regarding the legal services rendered by Richards subsequent to the Court of Appeal's August 30, 1985 decision and involving Richards' attempt to implement such decision without a remand or further instructions from the Court of

Appeals was that Petitioner would pay Richards on an hourly basis at a rate of $90.00 per hour as is provided in the written fee agreement dated September 17, 1985 and entered into between Petitioner and Richards (a copy of which is to be provided with Petitioner's appeal brief). The September 17, 1985 fee agreement also provides that Richards was to take all necessary actions to prepare and file applications with the Court of Appeals for attorneys' fees and expenses incurred on behalf of Petitioner for legal services rendered by Richards in Petitioner's appeals to the M.S.P.B. and to the Court of Appeals.

Pursuant to the terms and provisions of the fee agreement dated September 17, 1985 , Richards filed an Application for Attorneys' Fees and Expenses with the Court of Appeals on

September 30, 1985 for legal services rendered on behalf of Petitioner before the M.S.P.B. and the Court of Appeals. Thereafter Richards filed Supplemental Applications for Attorneys' Fees and Expenses on February 4, 1986, April 4, 1986, June 24, 1986 and July 24, 1986 [5] for legal services and expenses incurred by Petitioner in an effort to implement the Court of Appeals' August 30, 1985 decision. On July 25, 1986 and August 13, 1986 decisions by the Court of Appeals were entered wherein the Court refused to award attorneys' fees and expenses to Petitioner for fees and expenses incurred subsequent to its August, 1985

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5 Copies of the Applications for Attorneys' Fees and Expenses and all Supplemental Applications for Attorneys' Fees and Expenses will be provided with Petitioner's appeal brief.

decision. On October 1, 1986 a decision of the Court of Appeals was entered wherein the Court awarded attorneys' fees and expenses to Petitioner incurred by Petitioner prior to the Court of Appeals' August 30, 1985 decision in an amount equal to the amount paid to Richards by Petitioner.[6]

Petitioner is petitioning this Court for a Writ of Certiorari to review the decisions of the Court of Appeals dated July 25, 1986, August 13, 1986 and October 1, 1986, under 28 U.S.C. Section 1254(1).

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[6] The amount paid to Richards by Petitioner for Petitioner's appeals to the M.S.P.B. and the Court of Appeals, i.e. services rendered prior to the August 30, 1985 Court of Appeals decision, and the amount of attorneys' fees awarded Petitioner by the Court of Appeals each totaled an amount equal to $5,500.00.

REASONS FOR GRANTING THIS PETITION

I.

This Petition for Writ of Certiorari should be granted so that litigants and attorneys know whether and to what extent attorneys' fees will be awarded to prevailing parties under the Back Pay Act and the Equal Access to Justice Act.

It has been the common law in the United States that the losing party of a lawsuit shall not be responsible for the attorneys' fees of the prevailing party. Various statutes have been passed by both Congress and State legislative bodies which provide an exception to the common law and allow for, and sometimes mandate, an award of attorneys' fees to the prevailing party. The E.A.J.A. and the Back Pay Act are two such statutes.

Congress has been willing to provide for an award of attorneys' fees to the prevailing party under the E.A.J.A. and the Back Pay Act in order to (i) encourage attorneys to represent litigants with limited monetary resources in cases involving the protection and vindication of valuable rights and (ii) make the prevailing party economically whole. The Court of Appeals, however, has arbitrarily and capriciously abused its discretion by incorrectly interpreting the statutory language of the E.A.J.A. and the Back Pay Act by applying new limitations to the award of attorneys' fees under these two statutes, limitations which are not found in the language of the statutes nor in the legislative history of the statutes. Those limitations are:

1. That the prevailing party's recovery of attorneys' fees is

limited to an amount equal to the amount which the prevailing party has contractually incurred; and

2. That the prevailing party is not entitled to receive attorneys' fees for post-decision legal services rendered in an effort to implement the decision.

The fact that the Court of Appeals has arbitrarily added these two new limitations to the attorneys' fee provisions of the E.A.J.A. and the Back Pay Act should be reviewed by this Court for the simple reason that absent a ruling by this Court on the Court of Appeals' interpretation of the statutory language of the E.A.J.A. and the Back Pay Act, litigants with limited financial resources will not be able to intelligently and on a fully informed basis evaluate, determine and decide

whether they can afford to instigate/ defend a claim of action brought against/brought by the United States because they will not know to what extent attorneys' fees will be awarded to them. Also, absent a clarification by this Court of the attorneys' fee provisions of the E.A.J.A. and the Back Pay Act, attorneys will not know whether they will be adequately compensated and thus whether they can afford to take cases in which less than wealthy individuals are pursuing and protecting their rights in civil actions brought by or against the United States.

Therefore, whether or not litigants can afford and are able to seek remedies for violations of their rights and to rectify wrongs in personnel actions involving the United States as the employer and in other civil litigation where the

United States is suing or being sued, depends upon whether this Court reviews and rejects the Court of Appeals' interpretation of the attorneys' fee provisions of the E.A.J.A. and the Back Pay Act.

II.

Under the Equal Access to Justice Act and the Back Pay Act, the prevailing party is not limited to receiving an award of attorneys' fees in an amount equal to the amount for which the prevailing party is contractually liable.

A. The E.A.J.A.

The Court of Appeals limited its award of attorneys' fees to Petitioner under the E.A.J.A. to an amount which Petitioner had contractually agreed to pay his attorney, that amount being a sum equal to One Thousand Five Hundred

Dollars ($1,500.00), despite the fact that Richards had expended approximately three hundred (300) hours in appealing a decision by the M.S.P.B. to the Court of Appeals. [7]

The language of the E.A.J.A. does not limit an award of attorneys' fees to an amount contractually incurred by a litigant and it is clear from the legislative history of the Act that Congress did not intend the language of the statute to be interpreted in a manner wherein such a restriction would be applied. The House Committee on the Judiciary stated:

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[7] Richards subsequently rendered additional legal services on behalf of the Petitioner subsequent to the Court of Appeals' reversal of the M.S.P.B. decision in an effort to implement the Court of Appeals' decision. Petitioner's entitlement to an award of attorneys' fees for such legal services is discussed below.

> The definition establishes that fees are to be based on the prevailing market rates for the kind and quality of the services rendered...In general...a computation of attorneys' fees should be based on prevailing market rates without reference to the fee agreements between the attorney and client. The fact that attorneys may be providing services at salaries below the standard commercial rates which attorneys receive for services rendered is not relevant to the computation of compensation under the Act. In short, the award of fees is to be determined according to general professional standards.
>
> H.R. Rep. No. 96-1418, 96 Cong. 2d Sess. 15, reprinted in 1980 U.S. Cong. and Ad. News 4953, 4993-94 (emhasis supplied).

The Court of Appeals has grossly abused its discretion by erroneously and improperly limiting its award of attorneys' fees under the E.A.J.A. That Court's October 1, 1986 decision, wherein it limited its award of attorneys' fees to Petitioner to an amount equal to One Thousand Five Hundred Dollars

($1,500.00) for services performed by Richards on behalf of Petitioner in Petitioner's appeal of a decision by the M.S.P.B. to the Court of Appeals, should be reversed and Petitioner should be awarded an amount of attorneys' fees based on the prevailing market rate for services of the kind rendered by Richards and not limited to the amount of attorneys' fees contractually incurred by Petitioner.

B. The Back Pay Act

Petitioner paid Richards attorneys' fees in an amount equal to Four Thousand Dollars ($4,000.00) for Richards' legal services rendered in Petitioner's appeal to the M.S.P.B. The Court of Appeals in its October 1, 1986 Order, under the Back Pay Act, awarded Petitioner attorneys' fees in an amount equal to Four Thousand

Dollars ($4,000.00), despite the fact the Richards spent 61.7 hours on such appeal. Again the Court of Appeals limited its award of attorneys' fees only to the amount which the Petitioner was contractually obligated to pay Richards.

The language of the Back Pay Act, like the language of the E.A.J.A., does not state that an award of attorneys' fees under the Act is limited to the amount actually incurred by the litigant. The specific language provides for an award of "reasonable attorneys' fees" and the regulations implementing the Back Pay Act, 5 C.F.R. Section 550.806(d), provide that:

> When an appropriate authority determines that such payment is warranted, it shall require such payment of attorneys' fees in an amount determined to be reasonable by the appropriate authority...

The "appropriate authority" is that authority which corrected the unwarranted personnel action complained of by the Petitioner, 5 C.F.R. Section 550.806(a), in this case, the Court of Appeals. This means that the Court of Appeals has the power to award any amount of attorneys' fee which, in its discretion, is reasonable. Nothing in the language of either the statute or the regulations suggests that the Court of Appeals' discretion as to what is a reasonable attorneys' fee has an upper limit on it such as the amount of attorneys' fees actually contractually incurred by Petitioner. The Court of Appeals should not be free to assume the role of the legislature by amending the statute via an addition of more limitations than what the language of the statute provides. Congress had

its opportunity to specifically restrict the award of attorneys' fees to those contractually incurred by the litigant and chose not to do so, and the Court should not attempt to amend this statute through its interpretive powers when Congress has specifically chosen not to impose such a restriction. [8]

The Court of Appeals should therefore not have limited its award of attorneys' fees under the Back Pay Act to those fees paid by Petitioner since the language of both the statute and the regulations implementing the statute allows the Court to exercise discretion

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8 It should be noted that the M.S.P.B. has specifically held that the award of attorneys' fees under the Civil Service Reform Act, of which the Back Pay Act is a part, 5 U.S.C. Section 7701(g), is not limited to the amount contractually incurred by the litigant, Mitchell v. Department of Health and Human Services, 19 M.S.P.R. 206 (1984).

in awarding a reasonable fee without any limit on what amount the Court deems reasonable. This Court should therefore reverse that part of the Court of Appeals' October 1, 1986 decision limiting its award of attorneys' fees to Four Thousand Dollars ($4,000.00) for Richards' legal services rendered before the M.S.P.B.

C. A reasonable amount of attorneys' fees constitutes a reasonable hourly rate for legal services times the number of hours reasonably expended on the case.

1. The Equal Access to Justice Act.

The attorneys' fees which should be awarded under the E.A.J.A. is that amount which equals the product of a reasonable hourly rate, the Seventy-Five Dollar ($75.00) statutory rate [9], times the number

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[9] An amount of attorneys' fees awarded under Section 2412(d) of the E.A.J.A. is limited to an hourly rate equal to Seventy-Five Dollars ($75.00)

of hours reasonably expended on the lawsuit. Hoska v. U.S. Department of the Army, 694 F.2d 270 (D.C. Cir. 1982); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980); National Treasury Employees' Union v. Nixon, 521 F.2d 317 (D.C. Cir. 1975).

The Court of Appeals should have carefully reviewed Petitioner's Application for Attorneys' Fees and Expenses and all supplental Applications, which all contain an itemization of professional services rendered and time expended by Richards, and thereafter factored out any redundant, non-productive time and unavailing legal efforts to determine a reasonable number of hours expended by Richards. The Court of Appeals should then have multiplied the number of

reasonable hours expended by the Seventy-Five Dollars ($75.00) per hour rate to obtain the amount of attorneys' fees which should have been awarded to Petitioner instead of simply adopting the amount paid by Petitioner to Richards.

2. Policy reasons for awarding Petitioner a reasonable amount of attorneys' fees as opposed to that amount which Petitioner was contractually obligated to pay Richards.

Richards agreed to represent Petitioner even though Petitioner had been unemployed for over a year and had no money because (i) Richards felt Petitioner had been wronged by Respondent and that the wrong should be remedied, and (ii) Richards believed that if Petitioner was successful, Petitioner would be awarded

reasonable attorneys' fees under the E.A.J.A. and the Back Pay Act, which fees would be paid to Richards. As a result, Richards agreed to charge Petitioner for all costs incurred and a small flat fee for Richards' representation of Petitioner before the M.S.P.B. and the Court of Appeals. Petitioner was aware, throughout the appeals process, that he had been undercharged by Richards because of Petitioner's financial condition and that in the event Petitioner was awarded attorneys' fees, those fees would be due and owing to Richards even if the award exceeded the amount paid by Petitioner to Richards.

Richards had contemplated charging Petitioner a contingency fee, but because Richards felt that the chance of Petitioner succeeding in the appeals process was so remote and because Richards disliked

contingency fee agreements since they fail to make the client economically whole when attorneys' fees, usually amounting to thirty-three percent (33%) of the award, are paid to the attorney, Richards opted to rely on the statutory language of the Back Pay Act and the E.A.J.A. and collect attorneys' fees from Petitioner in the event Petitioner was awarded them.

Richards now finds himself in a no win situation because the Court of Appeals has failed to award Petitioner a reasonable amount of attorneys' fees simply because Petitioner was not contractually obligated to pay a reasonable attorneys' fee. Petitioner was not obligated to pay a reasonable attorneys' fee to Richards because Petitioner had no way of paying such a fee. Therefore, due to Richards' empathy for Petitioner's unfair discharge

and financial condition, Richards is being severely penalized by the Court of Appeals in its October 1, 1986 decision not to award Petitioner attorneys' fees exceeding Petitioner's contractual liability.

The practical effect of the Court of Appeals' decision is two-fold: (1) either attorneys will refuse to represent less than wealthy litigants in the future who have been wrongfully treated by the United States in civil matters; or (2) attorneys and clients will be forced to enter into contingency agreements constituting an infringement on the attorneys' and the clients' freedom to contract. Therefore, the two most important objectives of the attorneys' fee sections of the Back Pay Act and the E.A.J.A. (1) encouraging attorneys to take cases involving the protection of important rights and the remedying of wrongs committed by the

United States, and (ii) making the litigants ecnomically whole by not requiring them to pay attorneys' fees from their amounts awarded to them, will never be obtained.

It is important to remember here that we are not dealing with a tort case where part of the award often constitutes pain and suffering and punitive damages. In such tort cases, if the client and attorney have entered into a contingency agreement, the attorneys' fees often have no impact on the client's actual ont-of-pocket expenses because the attorneys' fees can be paid from that portion of the award involving punitive damages or pain and suffering. This is not the case in the matter presently before this Court. Here, if Richards had charged a contingency fee, Richards would have been paid out of Petitioner's award constituting his back pay and payment for other benefits

due and owing to Petitioner, Petitioner would never have been made economically whole and the wrong done to Petitioner by Respondent would not have been completely remedied.

Therefore in order that potential litigants are financially able to institute or defend cases involving illegal actions performed by the United States and to encourage attorneys to represent less than wealthy litigants in such cases, it is essential that awards of attorneys' fees to prevailing parties under the Back Pay Act and the E.A.J.A. not be limited to those fees contractually incurred by the prevailing party.

III.

An award of attorneys' fees under the Back Pay Act and the Equal Access to Justice Act should include post-decision legal services performed in order to implement a Court decision.

The Court of Appeals, in its July 25, 1986 and August 13, 1986 decisions, declined to award attorneys' fees for post-decision legal services performed by Richards in an attempt to implement the Court's August 30, 1985 decision reversing the decision of the M.S.P.B. which sustained Respondent's wrongful discharge of Petitioner. The August 30, 1985 decision did not remand the case to the M.S.P.B. for a determination of Respondent's back pay liability, nor for Respondent's liability to Petitioner for

overtime, pay increases, retirement benefits, pension benefits, medical insurance benefits and vacation pay or for a determination as to how Petitioner was to be reinstated in his former job with Respondent. The Court merely reversed the M.S.P.B. decision and acknowledged that the supervisors for the Federal Aviation Administration were "egregiously derelict". See appendix hereto, page 1a, infra.

As a result of the fact that the case was not remanded to the M.S.P.B. for implementation of the decision and that the decision failed to provide any order or instructions for implementation, the Petitioner found himself in a procedural limbo, not sure how to remedy the wrong committed by Respondent now that the Court of Appeals had in fact determined that the actions by the Respondent were

illegal. Petitioner filed a motion with the Court of Appeals requesting clarification of its decision, but the motion was denied. Richards thereafter spent many hours researching what strategy and procedures should be adopted to remedy the wrong done to Petitioner and negotiating with Respondent payment of Petitioner's back pay and other benefits due and owing to Petitioner and Petitioner's reinstatement.[10]

Because of the Court of Appeals' failure to remand the case to the M.S.P.B. and its failure to provide instructions for implementation of its decision, many issues remain unresolved even today, over fourteen months after the Court of Appeals' reversal.

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[10] Eventually Richards was successful in obtaining some back pay for Petitioner from Respondent in an amount equal to approximately One Hundred Nine Thousand Dollars ($109,000.00).

Those issues include, but are not limited to, the amount due and owing to Petitioner concerning overtime, pay increases, retirement benefits, pension benefits, medical insurance benefits and vacation pay. Petitioner and Richards are still attempting to resolve these issues and therefore Petitioner has incurred attorneys' fees subsequent to the August 30, 1985 Court of Appeals decision in an amount equal to Twenty-Seven Thousand Two Hundred Forty-Three Dollars ($27,243.00), for which Petitioner has been billed on an hourly basis and has paid to Richards. Despite the fact that Petitioner has contractually incurred and has paid such attorneys' fees, Petitioner has been denied an award for such post-decision legal services rendered on his behalf.

Additionally, in the Court of Appeals' decision dated July 25, 1986, the Court

of Appeals ordered both Richards and Petitioner to prepare and file with the Court a verified statement regarding the fee and expense arrangement entered into between them for the appeal to the Court of Appeals. This preparation of the verified statement, as well as subsequent supplemental statements filed on behalf of Petitioner, resulted in the rendering by Richards of additional legal services on behalf of Petitioner for which Petitioner had to pay. Even in this case where Richards was ordered to perform more attorney services for Petitioner by the Court of Appeals, the Court still refused to award attorneys' fees to Petitioner.

It must be emphasized that the post-judgment attorneys' fees were actually contractually incurred and paid by Petitioner and therefore, even if this

Court should hold that the attorneys' fees under the E.A.J.A. are limited to those contractually incurred by Petitioner, that holding will have no effect on the post-decision fees.

Every attorney knows that his work does not necessarily end when he obtains a favorable judgment or decision for his client. He knows that the judgment will have to be collected or the decision will have to be implemented. Therefore, for the Court of Appeals to deny awarding to Petitioner post-decision attorneys' fees under the E.A.J.A. ignores reality, especially in view of the many complicated issues arising subsequent to the Court of Appeals' August 30, 1985 decision. The Court of Appeals' decisions dated July 25, 1986 and August 13, 1986 denying all post-decision attorneys' fees should therefore be reversed and be awarded to Petitioner in an amount equal to Twenty-

Seven Thousand Two Hundred Forty-Three Dollars ($27,243.00).

CONCLUSION

This Petition for Writ of Certiorari should be granted so that this Court has an opportunity to remedy the Court of Appeals' abuse of discretion regarding the amount of attorneys' fees awarded to Petitioner and to review and reject the Court of Appeals' improper interpretation of the attorneys' fee provisions of the E.A.J.A. and the Back Pay Act, wherein the Court of Appeals limited its award of attorneys' fees to Petitioner under such statutes to the amount which was contractually incurred by Petitioner for legal services rendered prior to the Court of Appeals' reversal of the M.S.P.B. decision. A ruling by the United States Supreme Court on the proper use of discretion to be exercised by the

Court of Appeals when awarding attorneys' fees under such statutes and its proper interpretation of the statutes' statutory language will settle the question of what constitutes reasonable attorneys' fees under the statutes and whether the award of attorneys' fees should be limited to those attorneys' fees incurred during the trial and appeals process or should also include attorneys' fees incurred to enforce judgments and implement final decisions. Litigants would then be able to make informed decisions as to whether they could afford to instigate/defend civil actions brought against/by the United States in cases involving the protection of the litigants' rights and the rectifying of wrongs committed by the United States, and attorneys would know whether they could afford to represent such litigants because they would know whether their clients would be awarded

reasonable and appropriate attorneys' fees in the event they prevail.

Respectfully submitted,

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Counsel for Petitioner

October 22, 1986

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

HENRY C. CLANCY, Petitioner, v. DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Respondent.	Appeal No. 85-1077

DECIDED: August 30, 1985

Before FRIEDMAN, Circuit Judge, MILLER, Senior Circuit Judge, and NIES, Circuit Judge.

NIES, Circuit Judge.

DECISION

The decision of the Merit Systems Protection Board (board) in Case No. SF075281F2098, sustaining the removal of petitioner by the Department of Transportation, FAA (agency) from his position of Air Traffic Controller Specialist for participating in a strike against the government and absence without leave, is reversed.

DISCUSSION

This is a case where the agency failed to take any steps to protect an employee's right not to join a union; failed to protect him from prohibited activities by union members which endangered, not merely his career, but the safety of the flying public; instilled in him a fear that no protection was available against union attacks directed to him, a fear which would be engendered in a reasonable person; and,

finally, interfered with his defense to the adverse action.

The extraordinary combination of circumstances here requires reversal. This case presents not merely coercion by the union, but active participation by the agency in effectuating the union pressure directed against petitioner personally.

The agency supervisors were egregiously derelict in their duty to petitioner over more than a two-year period. His pleas for aid, assistance and protection by the agency, which his supervisors acknowledged were legitimate, were answered only with the advice to join the union. This was a clear violation of petitioner's statutory rights provided by 5 U.S.C. Sections 7102 and 7116(a), and a toleration of a discriminatory environment in the workplace, contrary to 5 U.S.C.

Section 2302(a), which seriously harmed petitioner and controlled his actions.

Considering the record as a whole, the removal of petitioner must be set aside as not in accordance with law and unsupported by substantial evidence. Alternatively, the agency action is tainted by a prohibited personnel practice. 5 U.S.C. Section 2302(a). The decision of the MSPB is, accordingly, reversed.

Note: This Order will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

HENRY C. CLANCY, Petitioner, v. DEPARTMENT OF TRANSPORATION FEDERAL AVIATION ADMINISTRATION, Respondent.	Appeal No. 85-1077

Before FRIEDMAN, Circuit Judge, MILLER, Senior Circuit Judge, and NIES, Circuit Judge.

NIES, Circuit Judge.

ORDER

On September 30, 1985, petitioner filed an application for an award under the Equal

Access to Justice Act (EAJA), 28 U.S.C. Section 2412 (1982), for attorney fees and expenses in the amounts of $52,822.00 and $1,119.22, respectively, for work directly on the appeal to this court. In this applicaton petitioner also sought attorney fees under the Back Pay Act, 5 U.S.C. Section 5596(b)(1)(A)(ii) (1982)., in the amount of $8,638.00 and expenses of $253.52 for work before the Merit Systems Protection Board. The application states that petitioner has actually paid counsel $5,273.00 for professional services and $1,821.00 for expenses. It further states that there is no contingent fee arrangement.

On February 4, 1986, petitioner filed an application for a "supplemental" award in the amount of $16,828.00 for fees and $244.13 for expenses covering activities of his attorneys following the decision, e.g., for research on the amount of

back pay, preparation of a motion for rehearing, and conferences with petitioner on such matters.

On April 4, 1986, petitioner filed a second "supplemental" application for attorney fees in the amount of $8,270.91 the largest single time charges being for "Research court mandate..."; "Research court rules regarding final judgments and appealable orders..."; "Preparation of material for backpay claims..."; "Conference with client regarding necessity to return to work..."; "Conference with client, Review employment records during separation..." Other activities during this period include settlement negotiations with FAA and the Department of Army.

On June 24, 1986, petitioner filed a third "supplemental" request for an additional $2,722.00 in fees and $126.72 in expenses for continued activities of

a like nature.

Thus, petitioner seeks a total of $91,074.50.

Action on the original application had been stayed pending decision by this court in Gavette v. Office of Personnel Management, 785 F.2d 1568 (Fed. Cir. 1986), decided February 28, 1986, and until action was taken on any petition for certiorari in Gavette , which respondent ultimately decided not to file. The respondent has not previously been given an opportunity to reply in this case.

Upon consideration of petitioner's applications,

IT IS ORDERED THAT:

1. Petitioner's supplemental applications filed February 4, 1986; April 4, 1986; and June 24, 1986, are denied. Inter alia, the applications are not "supplemental" to the original application in that the original bases asserted

for entitlement do not ipso facto apply to the subsequent work necessary to obtain respondent's compliance with the judgment.

2. Petitioner and petitioner's counsel are each ordered to submit a verified statement with respect to the fee and expense arrangement between them under which the appeal to this court was taken. Any written agreement with respect to fees and expenses shall accompany these statements. Any statement of billings previously sent to petitioner which are unpaid shall also be submitted. Statements with respect to the dollar amount of recovery actually received and the maximum amount reasonably estimated to be received shall be included. These statements shall be filed within one week of the date of this order.

3. Respondent's response to the

application of September 30, 1985, shall be due three weeks from the date on which the above statements are due. Respondent shall submit as part of its response a verified statement of time (including hours and dates) which its attorneys spent on the subject appeal between the date of the presiding officer's decision and the date of this court's decision. Respondent is also directed to bring to this court's attention any decisions of the Supreme Court bearing on the question of payment of fees in this case, particularly the payment of an amount in excess of the amount actually paid by a prevailing party or actually incurred by that party, in the sense of that party being under a legal obligation to pay, in litigation where the party is successful in vindicating only a private right.

4. Petitioner's request for fees under the EAJA in excess of $75.00 per hour is denied.

FOR THE COURT

/signature/
Helen W. Nies
Circuit Judge

July 25, 1986
Date

cc: Max C. Richards, Esq.
Sandra P. Spooner, Esq.

file stamp
U.S. Court of
Appeals For
The Federal
Circuit

Note: This order will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

HENRY C. CLANCY, Petitioner, v. DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION, Respondent.	)	Appeal No. 85-1077

Before FRIEDMAN, Circuit Judge, MILLER, Senior Circuit Judge, NIES, Circuit Judge.

NIES, Circuit Judge.

PUBLISHER'S NOTE:

The following page is unavailable for filming;

Appendix--2c---

ORDER

On July 24, 1986, petitioner filed a "Final Supplemental Application for Attorneys' Fees and Expenses Pursuant to 28 U.S.C. Section 2412(b) and (d), "seeking an additional $3,956.80 in attorney fees.

On July 25, 1986, this court issued an order seeking additional submission from the parties concerning petitioner's original fee request. In that order, the court also denied petitioner's supplemental applications filed February 4, 1986; April 4, 1986; and June 24, 1986.

Upon consideration of petitioner's application,

IT IS ORDERED THAT:

Petitioner's final supplemental application of July 24, 1986 is denied.

FOR THE COURT

/signature/
Helen W. Nies
Circuit Judge

August 13, 1986
Date

Note: This Order will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

HENRY C. CLANCY, Petitioner, v. DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Respondent.	)	Appeal No. 85-1077

Before FRIEDMAN, Circuit Judge, MILLER, Senior Circuit Judge, NIES, Circuit Judge.

NIES, Circuit Judge.

ORDER

Having considered the submissions of the parties, the nature, quantity, and

quality of the work involved, and that the merits in this case involved essentially factual rather than legal issues, it is hereby

ORDERED that Clancy is awarded $4,000.00 in fees and $12.60 in expenses under the Back Pay Act for work done before the Board (an amount which the government does not contest), and $1,500.00 in fees and $2,323.68 in expenses under the Equal Access to Justice Act for work done before this court.

FOR THE COURT

/signature/

Helen W. Nies
Circuit Judge

October 1, 1986

File stamp

U.S. Court of Appeals
For the Federal Circuit

Supreme Court, U.S.
FILED
JAN 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-680

In the Supreme Court of the United States

OCTOBER TERM, 1986

HENRY C. CLANCY, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that petitioner should recover no more than $5,500.00 in attorney fees.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-680

HENRY C. CLANCY, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals on petitioner's applications for attorney fees (Pet. App. 1b-2d) are unreported.

JURISDICTION

The final order of the court of appeals on petitioner's application for attorney fees was entered on October 1, 1986. The petition for a writ of certiorari was filed on October 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

BEST AVAILABLE COPY

STATEMENT

Petitioner challenges three unpublished orders of the court of appeals denying portions of his applications for attorney fees.

1. In an unpublished decision dated August 30, 1985 (Pet. App. 1a-4a), the court of appeals reversed a decision of the Merit Systems Protection Board (MSPB) which had sustained the decision of the Federal Aviation Administration (FAA) to remove petitioner for participation in a strike against the United States and for being absent without leave. Finding that petitioner's participation in the strike had been coerced by the union and that the FAA had been derelict in not protecting him from this coercion, the court concluded (*id.* at 4a):

> Considering the record as a whole, the removal of petitioner must be set aside as not in accordance with law and unsupported by substantial evidence. Alternatively, the agency action is tainted by a prohibited personnel practice. 5 U.S.C. Section 2302(a). The decision of the MSPB is, accordingly, reversed.

2. On September 30, 1985, petitioner filed an application for attorney fees. Under the Equal Access to Justice Act (EAJA), 28 U.S.C. (& Supp. III) 2412, petitioner sought $52,822.00 in attorney fees and $1,119.22 in expenses for the judicial portion of his action. Under the Back Pay Act, 5 U.S.C. 5596 (b)(1)(A)(ii), petitioner claimed $8,638.00 in attorney fees and $253.52 in expenses for the administrative portion of the case. Petitioner's application for fees asserted that he had actually paid his counsel $5,273.00 in fees and $1,821.00 in expenses. Pet. App. 1b-2b.[1]

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[1] Action on the application was stayed pending the en banc decision of the Federal Circuit and a decision by the gov-

Petitioner filed a "Supplemental Application For Attorney's Fees and Expenses" on February 4, 1986. In it, he claimed entitlement under EAJA to an additional award of $16,828.00 in attorney fees and $244.13 in expenses for efforts expended by his counsel after the court's decision. These efforts allegedly included research on the amount of back pay to which petitioner was entitled, preparation of an (unsuccessful) motion for rehearing, and conferences with petitioner about such matters. Pet. App. 2b-3b.

A "Second Supplemental Application For Attorney's Fees and Expenses" was filed on April 4, 1986. Petitioner sought an additional award under EAJA of attorney fees and expenses of $8,270.91. He claimed that this was to pay his counsel for "[r]esearch[ing] court mandate" and the court's rules regarding final judgments, preparing materials for the back pay claim, consulting with petitioner regarding his employment records and the necessity to return to work, and settlement negotiations. Pet. App. 3b.

On June 24, 1986, petitioner filed a "Third Supplemental Application for Attorney's Fees and Expenses," claiming fees of an additional $2,722.00 and expenses of an additional $126.72 under EAJA. The tasks allegedly being performed by counsel were simlar to those in the previous application. Pet. App. 3b-4b.

On July 24, 1986, petitioner filed a "Final Supplemental Application for Attorney's Fees and Ex-

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ernment on whether to seek certiorari in *Gavette* v. *Office of Personnel Management*, 785 F.2d 1568 (Pet. App. 4b). *Gavette* was decided on February 28, 1986, and held that the Back Pay Act, and not EAJA, applied to fee awards for proceedings before the MSPB, but that EAJA could then be applied to fee awards on the appeal to the Federal Circuit.

penses," in which he claimed additional attorney fees and expenses under EAJA of $3,956.80 (Pet. App. 3c). This claim was based largely upon efforts alleged to have been expended in reviewing the FAA's back pay calculations.

In sum, petitioner's various applications for attorney fees and expenses sought fees and expenses totalling $99,960.30.[2]

3. a. On July 25, 1986, the court of appeals issued an order (Pet. App. 1b-7b) addressing all of petitioner's applications except the final supplemental application. The court first denied petitioner's supplemental applications (*id.* at 4b-5b) on the ground that,

> [*i*]*nter alia*, the applications are not "supplemental" to the original application in that the original bases asserted for entitlement do not *ipso facto* apply to the subsequent work necessary to obtain [the government's] compliance with the judgment.

Second, the court ordered petitioner and his counsel to submit verified statements with respect to the appellate fee arrangements between them, accompanied by copies of any written agreements on the subject. Any statements of unpaid billings were also to be supplied, along with statements as to the dollar amounts of the recovery received and expected to be received. *Id.* at 5b. Third, the court ordered the government to respond to the original application and to submit, as part of its response, a verified statement of the amount of time spent by its attorneys between the date of the MSPB presiding official's decision and the date of the court's decision. The gov-

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[2] The figure is taken from petitioner's final application.

ernment was also directed to bring to the court's attention any decision of this Court regarding, in particular, awards of fees not actually incurred when the client was engaged in vindicating only a private right. *Id.* at 5b-6b. Finally, the court denied petitioner's request that his counsel be compensated at a rate for his appellate work in excess of the $75.00 per hour set forth in EAJA (*id.* at 7b).

b. In an order entered on August 13, 1986, the court of appeals denied petitioner's fifth and "final" application for fees, referring to its July 25, 1986, order denying all but petitioner's original fee application (Pet. App. 1c-3c).

c. Petitioner's submission pursuant to the court's July 25, 1986, order advised, among other things, that the fee agreement between counsel and petitioner required petitioner to pay $4,000 and expenses for counsel's services during the administrative proceedings, and $1,500 and expenses for services performed in connection with the judicial proceedings (see Pet. 7, 9).

On October 1, 1986, the court of appeals issued its order on petitioner's initial application for fees and expenses (Pet. App. 1d-2d). It provided in toto (*ibid.*):

> Having considered the submissions of the parties, the nature, quantity, and quality of the work involved, and that the merits in this case involved essentially factual rather than legal issues, it is hereby
>
> ORDERED that [petitioner] is awarded $4,000.00 in fees and $12.60 in expenses under the Back Pay Act for work done before the Board (an amount which the government does not contest), and $1,500.00 in fees and $2,323.68

in expenses under the Equal Access to Justice Act for work done before this court.

ARGUMENT

Petitioner contends that the court of appeals erroneously ruled that (1) awards of attorney fees under the Equal Access to Justice Act are limited to the amount actually incurred by the party, (2) awards under the Back Pay are similarly limited, and (3) fees may never be awarded under EAJA for post-decision activity. The court of appeals made none of these rulings, and its computation of an appropriate award based on the evidence submitted by petitioner does not merit review by this Court.

1. Contrary to petitioner's contention, the court of appeals did not say that it was interpreting EAJA to limit attorney fee awards to the amount actually incurred by the client. The government expressly told the court that there is no such limitation (see 8/21/86 Respondent's Opposition to Petitioner's Application for Attorney Fees and Expenses (Respondent's Opposition) 8 n.14, 12 n.22, 24-25 n.36). In doing so, we brought to the court's attention (*id.* at 24-25 n.36) the explicit legislative history to the contrary: "the computation of attorney fees [under EAJA] should be based on prevailing market rates without reference to the fee arrangements between the attorney and client." H.R. Rep. 96-1418, 96th Cong., 2d Sess. 15 (1980).

While the court of appeals did not explain its calculation except as stated above (pages 5-6), it evidently concluded that, in this case, the only reliable evidence of an appropriate fee was the amount actually incurred. We argued below that petitioner's EAJA application was so obviously excessive that a

fee award should be denied altogether or at least in large part (Respondent's Opposition 22-30). For example, we questioned the claimed expenditure of 377.3 hours by two lawyers (22 times the amount expended by the government) on an appeal after 61 hours had already been expended below (*id.* at 22-23), and we pointed out that the application included a claim that three hours were required to prepare a one-page notice of appeal (*id.* at 29 n.44). Similarly, we noted that the claimed $140 per hour rate for lead counsel was neither statutorily nor factually justified (*id.* at 26-27). The court of appeals evidently concluded, after review of these and other excesses, that the only reliable documentation submitted by petitioner—who bears the burden, of course, of demonstrating the fees to which he was entitled—was the fee agreement.

2. The court of appeals did not state that recovery under the Back Pay Act is invariably limited to the fee obligation incurred. The government argued that the $140 hourly rate claimed by petitioner was unreasonable (Respondent's Opposition 13-15).[3] The court of appeals may have concluded that the unreasonable rate claimed by petitioner left it with no

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[3] We pointed out that the $140 hourly rate grossly exceeded petitioner's counsel's own valuation of his services (in the fee agreement) at $90 an hour; that the supporting affidavits of other lawyers in Tuscon were inadequate; that petitioner's counsel had not even supplied the court with evidence of his own customary rate in cases of this nature; and that he had not established that his qualifications merited more than $90 an hour. We did not challenge the $90 figure or the number of hours claimed, although of course the court was not bound to accept them. If the $90 figure were used and petitioner's counsel's hours were fully credited, the total Back Pay Act award would be $5,553, or $1,553 more than petitioner paid his counsel and received in the award.

choice but to award the amount actually incurred, without reaching the question whether a properly documented claim for an amount greater than the incurred amount would have to be rejected.

In any event, as we argued to the court of appeals (Respondent's Opposition 8-13), the Back Pay Act does *not* allow the award of attorney fees in excess of the amount incurred by the client. The Back Pay Act (5 U.S.C. 5596(b)(1)(A)(ii)) provides for the award of "reasonable attorney fees," but also contains a requirement, which has been read to apply to all Back Pay Act fee cases, that the awards be "in accordance with standards established under [5 U.S.C. 7701(g)]."[4] Section 7701(g)(1), in turn, provides for payment of "reasonable attorney fees *incurred* by an employee" (emphasis added). See also, *e.g.*, *Sterner* v. *Department of the Army*, 711 F.2d 1563, 1565-1566 (Fed. Cir. 1983) (dicta). Unlike EAJA, for instance (see page 6, *supra*), there is nothing in the legislative history of the Back Pay Act to indicate that fees were not to be limited to the amount incurred. Fee-shifting is the exception, not the rule (*Alyeska Pipeline Service Co.* v. *Wilder-*

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[4] The conference report, H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 142 (1978), treated Section 7701(g)'s criteria as applying generally to Section 5596(b)(1)(A)(ii). This is also how the court in *Sims* v. *Department of the Navy*, 711 F.2d 1578, 1579-1581 (Fed. Cir. 1983), the MSPB in *Wells* v. *Harris*, 2 M.S.P.R. 409, 412-413 (1980), and 5 C.F.R. 550.806(c) have interpreted the statute, and we know of no authority to the contrary. See also *Gavette*, 785 F.2d at 1575 & n.40; *id.* at 1581 (Bissell, J., dissenting); *Crowley* v. *Shultz*, 704 F.2d 1269, 1272-1275 (D.C. Cir. 1983). Section 5596(b)(1)(A)(ii) could also be read to require application of the 7701(g) criteria only to a subclass of cases not including the present case; we are aware of no authority supporting that reading, however.

ness Society, 421 U.S. 240 (1975)), and, in any event, as a waiver of sovereign immunity the Back Pay Act's attorney fee provision must be strictly construed. *Library of Congress* v. *Shaw*, No. 85-54 (July 1, 1986), slip op. 7-8; *Nibali* v. *United States*, 634 F.2d 494 (Ct. Cl. 1980) (Back Pay Act claim).

There is a logical reason to limit Back Pay Act fees in this way, even though there is no such limit under, for instance, the civil rights statutes.[5] A Back Pay Act claim implicates only private, not public, rights. In no sense can petitioner's counsel be thought of as a "private attorney general" whose efforts merit reimbursement from the public fisc, nor would there have been any reason to make his client more than whole. See 5 C.F.R. 550.801(a) (Section 5596 "authorizes the payment of back pay and reasonable attorney fees for the purpose of making an employee financially whole"); S. Rep. 95-969, 95th Cong., 2d Sess. 115 (1978) (Section 5596(b)(1) provides that an "employee is entitled to be made whole"); cf. *Gavette*, 785 F.2d at 1576. Petitioner points to no authority for the proposition that the fees guaran-

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[5] Indeed, 5 U.S.C. 7701(g) expressly provides that, where the underlying claim is based on discrimination, the "standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k))" apply to the payment of attorney fees. If *all* Back Pay Act attorney fee claims were to be decided under these standards, as petitioner apparently urges, then the proviso quoted would have been superfluous. The legislative history also indicates that, unlike civil rights actions (see *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)), an award to an employee under the Back Pay Act is not to be presumed even when he has prevailed. See H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 142 (1978); S. Rep. 95-969, 95th Cong., 2d Sess. 60-61 (1978). See also 5 C.F.R. 550.806(e).

teed by the Back Pay Act may be greater than the amount contractually agreed upon.

3. Finally, petitioner contends that the court of appeals erroneously concluded that fees may never be awarded under EAJA for post-decision efforts. Here again, however, petitioner mischaracterizes the court's decision. The pertinent part of the order denying the applications for post-decision fees read: "*Inter alia*, the applications are not 'supplemental' to the original application in that the original bases asserted for entitlement do not *ipso facto* apply to the subsequent work necessary to obtain respondent's compliance with the judgment" (Pet. App. 4b-5b). We read this as pointing to the fact that petitioner had made no attempt to show, for the post-decision work, the basic prerequisite that the fees be of the sort recoverable under EAJA,[6] and had not asserted that the government's position was not "substantially justified" (28 U.S.C. (Supp. III) 2412(d)(1)(A)).[7] Again, the presumption is against both

[6] EAJA provides for awards "in any civil action" (28 U.S.C. (Supp. III) 2412(d)(1)(A)), and here, with minor exceptions, the supplemental fees requested were for efforts after the action had ended. Where the post-decision work is entirely derivative of the civil action—for instance, the preparation of a fee application (see *Schuenemeyer* v. *United States*, 776 F.2d 329, 333 (Fed. Cir. 1985))—an award under EAJA may be appropriate, but where the claimant shows no such derivation from the civil action, EAJA is inapplicable. Cf. *Gavette*, 785 F.2d at 1572-1573. Nor did the government argue that all post-decision EAJA fees were barred; indeed, we were not requested and therefore were not entitled to respond to petitioner's supplemental applications at all.

[7] With regard to "substantial justification," it was hardly the government's fault that petitioner, having won the case, could not figure out how to proceed, and petitioner does not

fee-shifting and waivers of sovereign immunity, and the court of appeals evidently concluded that petitioner had not demonstrated enough to overcome this presumption.

---

assert that the government's behavior at this point was not substantially justified. Indeed, far from obstructing petitioner's progress, we explained to him a month after the court of appeals' decision that the law is clear that "[his] removal is necessarily cancelled and the agency is required to reinstate [him]," that "[his] entitlement to back pay is governed by the Back Pay Act, which is self-effectuating," and that "if [he] is not satisfied with the relief afforded to him by the [FAA], he can file an enforcement action with the [MSPB]." 10/4/85 Respondent's Opposition to Petitioner's Motion for Partial Remand to the Merit Systems Protection Board 1-2 (footnote and citation omitted). Fees should not be allowed for separable claims in which the government's position was substantially justified. See *Cinciarelli* v. *Reagan*, 729 F.2d 801, 804-805 (D.C. Cir. 1984); *Goldhaber* v. *Foley*, 698 F.2d 193, 197 (3d Cir. 1983); cf. *Hensley* v. *Eckerhart*, 461 U.S. 424, 434-437 (1983).

An analogy may be drawn to the unanimous holdings of those courts of appeals to decide the issue that fees are awardable under EAJA for fee litigation only if the government's position on the fee litigation was not justified, even if the government's position on the merits was not. *United States* v. *Estridge*, 797 F.2d 1454, 1459-1460 (8th Cir. 1986); *Russell* v. *National Mediation Board*, 775 F.2d 1284, 1291 n.8 (5th Cir. 1985); *Continental Web Press, Inc.* v. *NLRB*, 767 F.2d 321, 324 (7th Cir. 1985); *Rawlings* v. *Heckler*, 725 F.2d 1192, 1196 (9th Cir. 1984). A holding to the contrary in *Haitian Refugee Center* v. *Meese*, 791 F.2d 1489 (11th Cir. 1986), was vacated by the court of appeals in relevant part on December 4, 1986.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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